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**COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION**

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PUBLIC SERVICE
COMMISSION

In the Matter of:

**AN ADJUSTMENT OF THE GAS AND)
ELECTRIC RATES, TERMS, AND)
CONDITIONS OF LOUISVILLE GAS)
AND ELECTRIC COMPANY)**

**CASE NO.
2003-00433**

AND

**AN ADJUSTMENT OF THE ELECTRIC)
RATES, TERMS AND CONDITIONS OF)
KENTUCKY UTILITIES COMPANY)**

**CASE NO. ✓
2003-00434**

**KIUC'S MEMORANDUM IN OPPOSITION
TO ATTORNEY GENERAL'S MOTION
TO SET ASIDE RATE DETERMINATIONS**

On October 21, 2004 the Attorney General of the Commonwealth of Kentucky ("AG") filed its Motion to Set Aside Rate Determinations ("Motion") in the above captioned matter. The Kentucky Industrial Utility Customers, Inc. ("KIUC") respectfully requests that the Kentucky Public Service Commission ("Commission") deny the AG's Motion and submits this Memorandum in Support.

INTRODUCTION

In its Motion the AG requests that the Commission: 1) set aside the rate determinations in the above captioned matters; and 2) direct the Companies to resubmit its applications for rate increases.

KIUC opposes the AG's request because the AG has shown no evidence of wrongful *ex parte* communications between the Companies and the Commission and Kentucky law requires that there be a determination that there has been a wrongful *ex parte* contact which materially and adversely affected the agency's decision in order for the decision to be set aside.

1. The AG Has Made No Showing Of Wrongful *Ex Parte* Communications.

The AG mischaracterizes the rule stated in LG&E v. Cowan, 862 S.W.2d 897 (1993). The AG cites Cowan for the principle that any *ex parte* contact, no matter how trivial or important, render the rate determinations in this case invalid.¹ The AG assumes that any *ex parte* contact between an employee of the Companies and Commission personnel during the pendency of the rate case is wrongful. In contrast, Cowan states that, "*an ex parte contact is condemnable, when it is relevant to the merits of the proceeding between an interested person and an agency decisionmaker.* (Citing Professional Air Traffic Controllers Organization v. Federal Labor Relations Authority, 685 F.2d 547, 564 (D.C.Cir. 1982) ("PATCO")) *Since the contact must relate to the merits of the proceeding, legitimate procedural and status inquiries are not subject to sanction.*"²

An *ex parte* contact is not wrongful unless it is a meaningful communication between an interested party and an agency decision-maker which is intended to affect the merits of the case. The AG's claim that it has discovered "*a vast number of ex parte contacts*" between the Companies and PSC personnel is not sufficient to support the AG's Motion to set aside the Commission's rate determination absent a showing of the context of such communications. Further, the Companies and Commission

¹ Attorney General's Motion to Set Aside Rate Determinations (October 21, 2004), pages 4-5.

² LG&E v. Cowan, 862 S.W.2d 897, 900 (1993).

personnel must be afforded the opportunity to respond to specific allegations and evidence by the AG before any determination is made that a wrongful *ex parte* contact has been made.

The AG's position does damage to the fair regulation of utility rates in Kentucky. Under the AG's standard, a wrongful *ex parte* contact would occur if an employee of the utility innocently asked a Commissioner during a hearing break if he was working hard on the rate case and the Commissioner replied, "*Yes, this is a very difficult and important case.*" From what we have seen, the AG has not made a prima facie case.

The AG's Motion is premature in requesting that the Commission's rate determinations be set aside, because it has not presented any evidence of specific, condemnable *ex parte* contacts. In the Status Report of Attorney General submitted on October 12, 2004 the AG failed to cite any specific incidents of condemnable *ex parte* contacts, instead the AG asked the Commission to "*hold these matters in abeyance,*"³ because its investigation is ongoing.⁴ Less than two weeks later, and again without any supporting evidence of "collusion" the AG filed its Motion to set aside the Commission's rate determination. In other words, without any showing of change of circumstance between its submission of its Status Report and its October 12, 2004 Motion, the AG now requests that the rate determinations in this case be set aside and that the Companies refile their applications for rate increases. Obviously, setting aside the Commission's decision in this case and reopening this case anew would be extremely costly for the Commonwealth, the Companies, and the intervening parties and would burden ratepayers that value rate certainty. The Commission should not impose such a tremendous encumbrance without, at the very least, some evidence of actual fraud or "collusion."

³ Status Report Of Attorney General (October 12, 2004), page 3.

⁴ Id. at page 1.

Finally, the AG would hold the Commission to a higher standard than that applied to the courts. Although it is clear that the type of outrageous *ex parte* contacts described in PATCO should not be tolerated,⁵ it is wrong to apply a higher standard to Commission proceedings than to court proceedings because the setting of utility rates is a legislative function which is delegated to the Commission by the Legislature and which only generally follows a judicial procedure. The Kentucky Court of Appeals in National-Southwire Aluminum Company v. Big Rivers Electric Corporation, Ky. App., 785 S.W.2d 503, 515 (1990) stated that despite its sometimes judicial structure rate making is more a legislative process than judicial and a less strict standard for assessing *ex parte* contacts is appropriate when considering such communication in the context of a PSC proceeding. The Court explains:

During oral argument, we also learned that the PSC had engaged in some ex parte efforts to resolve the problems in this case. In some situations, such action might be condemnable, but it appears that the PSC's ex parte efforts were done with each of the parties, and such efforts were basically for purposes of mediation and fact finding. We find no reversible error resulting from this activity. Although open hearings and some adjudicating are involved, ratemaking is basically a legislative function. Commonwealth ex rel. Stephens v. South Central Bell Tel. Co., supra,⁶ held that courts need not inquire into the wisdom of legislative procedures, unless they are tainted by malice, fraud or corruption. We are primarily concerned with the product and not with the motive or method which produced it.⁷

⁵ “From the special hearings emerges an appalling chronicle of attorneys, high government officials, and interested outsiders apparently without compunction about intervening in the course of [Federal Labor Relations Authority]’s decision-making by means of private communications with those charged with resolving the case on its merits.” LG&E v. Cowan, at 901. quoting concurring opinion of Chief Judge Spottswood W. Robinson in PATCO.

⁶ Commonwealth ex. rel. Stevens v. South Central Bell Tel. Co., Ky., 545 S.W. 2d 927 (1976).

⁷ See also, Kentucky Industrial Utility Customers, Inc. v. Kentucky Utilities Company, 983 S.W.2d 493, 497 (1998) (“It is well settled that rate making is a legislative function and the power vested in the legislature to make rates may be exercised by it either directly or through some appropriate agency.”)

2. **Kentucky Law Requires That Wrongful Ex Parte Contacts Actually Affect The Commission's Rate Determinations In Order For A Decision To Be Set Aside.**

Even if the AG is eventually able to demonstrate that condemnable *ex parte* contacts were made the rate determinations in this case would not be *per se* invalid. Although dicta in Cowan chastises the parties for participating in two *ex parte* meetings in which a settlement proposal was discussed⁸ the Court clearly states (also dicta) that:

*“the rule in Kentucky is that such ex parte contacts make administrative agencies' decisions voidable, not void per se.”*⁹

*“If an improper ex parte contact has been made, it will void an agency decision where the decision was tainted so as to make it unfair to the innocent party or to the public interest the agency is supposed to protect. The question of whether a decision has been tainted requires analysis of whether the improper contacts may have influenced the agency's ultimate decision; whether the contacting party benefited from the decision; whether the contents of the contact were disclosed; and whether vacation and remand would serve a useful purpose.”*¹⁰

According to Kentucky law, an agency decision will not be overturned due to the presence of an *ex parte* contact without a finding that the contact actually corrupted the outcome of the case and that invalidation of the decision serves a useful purpose. Obviously, given that the threshold requirement that there be an actual finding of a condemnable *ex parte* contact has not been satisfied it is premature to consider whether the alleged *ex parte* contacts tainted the Commission's rate determinations. The AG's Motion to set aside the Commission's rate determinations in this matter should be denied because it has not presented any evidence of a wrongful *ex parte* communication between the Companies and the

⁸ LG&E v. Cowan, 862 S.W.2d 897, 901-902 (1993).

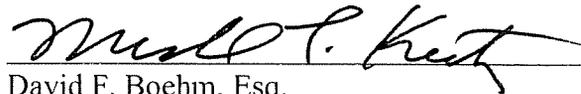
⁹ Id.

¹⁰ Id. at 901, citing Professional Air Traffic Controllers Organization v. Federal Labor Relations Authority, 685 F.2d 547, 564-65 (D.C.Cir. 1982).

Commission and given this lack of evidence it is impossible to consider whether the Commission's rate determination should be voided.

Finally, we wish to add that we file this pleading not because our members welcome rate increases; but because we believe that the reputation of the Commission has been unfairly tarnished. The unsupported allegations of the AG have unnecessarily called into question the integrity of the ratemaking process. This has undermined the public trust and has done a disservice to all ratepayers.

Respectfully submitted,



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